IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Subchapter V
SMALLHOLD, INC.,	.	
	.	
Debtor.	.	Case No. 24-10267 (CTG)
	.	
	.	August 22, 2024
. . . . .	.	10:00 a.m.

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TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE

Appearances:

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I N D E X

HEARING REGARDING: Debtor's Third Amended Plan of Reorganization [with Technical Modifications] (D.I. 250)

RULING: Confirmation Approved

THE COURT: Be seated.

So, good morning. We're here in In Re Smallhold, which is Case No. 24-10267.

Mr. Barsalona, you can proceed.

MR. BARSALONA: Good morning, Your Honor. For the record, Joe Barsalona from Pashman Stein Walder & Hayden on behalf of the debtor, Smallhold, Inc. With me at counsel table is my partner, Henry Jaffe, as well as my colleague, Alexis Gambale, and also Amy Oden is also sitting in the gallery.

Also in the gallery is our witness, Mr. Tariq Jawad who is a board member and also the interim CFO of the company.

Your Honor, we're hopefully going to have a short agenda today. Obviously, the big item is confirmation. But first let me touch on No. 2 which s the motion of KSS Sales. I understand that counsel has uploaded that order, so that is ready to be uploaded there.

THE COURT: That's the administrative claim, the allowed administrative claim.

MR. BARSALONA: That is correct. That's correct.

THE COURT: Okay. So we'll enter that order after the hearing.

MR. BARSALONA: Thank you, Your Honor.

So moving on to confirmation, although this was a small business case, Your Honor, it had big drama in it. It's lasted more months than we had hoped, but we are here with what

we believe an incredibly value maximizing plan for all of the debtor's constituents.

As we stand here today, Your Honor, the only aspect that is contested is the release provisions which we will get to later today. And for purposes of the record, the Camber objection is either moot or has been abandoned. I understand from Mr. Ward who is in the gallery who represents Capital, who of course purchased the claims that Camber once held, will not be prosecuting that objection. We had extended Capital's independent objection deadline to last Friday. They chose not to file one, and talks continue between the debtor as well as Capital to make sure there is minimal drama going forward post-effective date.

But with that, Your Honor, we would like to go to confirmation. And as it pleases the Court, we would like to first handle the evidentiary record. My partner, Henry Jaffe, will manage that. And then after that, if the Court or other parties have questions related to the plan, I can answer that. And then after that we can proceed to the oral argument on the release provisions followed the order.

If that's acceptable to Your Honor, I'll hand off the lectern.

THE COURT: That makes good me, Mr. Barsalona. So thank you.

MR. BARSALONA: Thank you, Your Honor.

THE COURT: Mr. Jaffe.

MR. JAFFE: Good morning, Your Honor, may it please the Court, Henry Jaffe, Pashman Steinwalder Hayden. As Mr. Barsalona mentioned, I am here today to deal with what I hope is going to be a very brief and hopefully persuasive evidentiary portion. In order to assist the Court and to make this a little more streamlined, we have presented testimony by declaration, so let me get into that.

Your Honor, we have two witnesses today. We have Tariq Jawad, who as Mr. Barsalona noted, is in the courtroom. He has submitted declarations and he is available to testify if necessary. We also have Emily Young who is the director of Epiq. Ms. Young would be available to testify by phone in support of plan, solicitation of plan, voting process.

Your Honor, let me start with Mr. Jawad. We filed two declarations for Mr. Jawad in support of plan confirmation. The first declaration was filed last Friday, it's Docket No. 242. These are for the most part the general statements of fact that are needed to support plan confirmation under applicable portions of chapter 11, and also the subchapter V standards.

We also filed a supplemental declaration. And by the way, that is going to be Exhibit S1. We also filed a supplemental declaration yesterday, Your Honor, and that is our exhibit S2. The Exhibit S2 contained also two other exhibits,

they are in the declaration, that are Exhibits 1 and 2. But for purposes of the record today, they are Exhibits S3 and S4. We also have S5 which is a copy of the first amended plan which the Court could take judicial notice of.

So just to give the Court a little flavor, let me explain briefly why we filed the supplemental declaration. There are a couple of main reasons we did that.

First of all, Your Honor, we wanted to lay a proper foundation for the admission of the financial projections. And in doing so, we explained the bonafides of Mr. Jawad's career, his history of financial background, also his experience in being an interim CFO and consultant to companies in these types of spaces. And we wanted to show that the projections were not only more than reasonably likely, which is the standard under the subchapter V in order to have the exception to the absolute priority rule, but actually more than that, we think the projections are viable, conservative and readily achievable.

In addition, Your Honor, we wanted to file it and I will take an aside here, we have had a very productive relationship with the subchapter V trustee who has really done a great job of doing what she should do which is to bring issues to our attention, things that concerned her. And we wanted to make sure we had a very fulsome declaration to ensure that we addressed her issues and her concerns, some of which we hadn't really thought through, and really did the whole process

a great favor by providing input.

Secondly, we wanted to provide some additional testimony in support of the plan sponsor who among other things is going to be backstopping the payment of all general unsecured claims as projected under the financial projections, and also the lion's share of the administrative claims. It's quite an undertaking, and we wanted to support the bonafidea of the plan's sponsor who has been an excellent financial partner and supporter of the debtor throughout this entire chapter 11 process.

Finally, Your Honor, we wanted to provide some more color to the process that occurred where the debtor was receiving expressions of interest from an entity known as Capital 1 LLC. We wanted to show that there was really a very fulsome process that occurred here, that we had a really I will say a really tremendous independent director slate that took these proposals once they became serious, once they became proposals that were in some way competitive with the then existing file plan, they took them very seriously, they engaged in the process where they took the offers, they considered them, they asked questions, and they went back to the plan sponsor and approved the treatment, not just on secured creditors; they approved backstops, included post-petition financing.

Where we are with the plan from the beginning to

where we are now is light years, and it's in no small measure due to the efforts of the independent directors who I've said have done a tremendous job especially considering the challenges in the subchapter V case where maybe equity is, you know, where the company doesn't necessarily have to go up for sale, but they treated it as though they had very serious and important duties to creditors, and I think that is evident in the result.

So with that, Your Honor, I would like to offer into evidence to begin declarations of Mr. Jawad, those are Exhibits S1 and S2.

THE COURT: Okay. Is there any party in interest that would like to be heard with respect to the admission into evidence of either of Mr. Jawad's declarations that are at S1 and S2, and they are docketed at D.I. 242 and 256 respectively?

Okay. Seeing none, those declarations will be admitted into evidence.

(Exhibits S1 and S2 admitted into evidence.)

THE COURT: Is there any party in interest that would like to cross-examine Mr. Jawad with respect to the matters set forth in those declarations?

Okay. Seeing none, Mr. Jaffe, you can proceed.

MR. JAFFE: Great. Your Honor, as I said, we were laying a foundation for other exhibits, and so in light of the admission of those declarations, I would further seek to admit

Exhibit S3 which is the financial projections, S4 which was the final Capital letter of intent or proposal that was made which the board responded to, and the first amended plan which is S5. Of course, the Court can take judicial notice. The purpose of these things is to give the Court some insight into how far this process has led the board to push the plan sponsor in a very productive way and improve treatment for creditors and improve the viability of the plan.

THE COURT: Okay. Thank you, Mr. Jaffe.

Is there any party in interest that objects to the admission into evidence of the three documents that Mr. Jaffe has identified that are Exhibits S3, S4, and S5?

Okay. Seeing no objection, those will be admitted.

(Exhibits S3, S4 and S5 admitted into evidence.)

MR. JAFFE: Thank you, Your Honor.

The last part of testimony and exhibit admission relates to declarations that we filed for Ms. Young. We filed a declaration at Docket No. 212 which is Exhibit S6. This is an initial declaration that discusses solicitation and balloting efforts of Epiq, and also discusses ballot results.

In addition, we have the declaration of Ms. Young which was filed on August 16th, Docket No. 245, this is Exhibit S7. Provides updating balloting results which reflect the DIP lender converting its vote to a no vote, from a no vote to a vote in favor. And I would offer these two declarations into

evidence as well, Your Honor.

THE COURT: Okay. So is there any party in interest who would like to be heard with respect to the admission into evidence of the two declarations of Ms. Young that are Exhibits S6 and S7, and are docketed at D.I. 212 and 245?

Seeing no objection, those declarations will be admitted into evidence.

(Exhibits S6 and S7 admitted into evidence.)

THE COURT: Is there any party in interest that wishes to cross-examine Ms. Young with respect to the matters set forth in her declaration? Okay. I'm seeing none.

Mr. Jaffe, you can proceed.

MR. JAFFE: Thank you, Your Honor. That concludes our evidentiary presentation for today. Unless Your Honor has any further questions, I'll sit down so Mr. Barsalona can continue his presentation.

THE COURT: Okay. I don't have questions about the evidentiary record, so I appreciate that, Mr. Jaffe. I'm happy to allow you to pass the baton back.

MR. JAFFE: Thank you, Your Honor.

THE COURT: Thank you, Mr. Jaffe.

Mr. Barsalona?

MR. BARSALONA: Thank you, Your Honor. And now we get to the plan, which as I stated is a far different plan than what we filed on our 90 day deadline back in May. And what

started as 1191(b) plan remains an 1191(b) plan, there's no question about that. We had always intended that an administrative claims would be paid under the terms of the plan, and for that solicitation really did not matter.

Nevertheless, we still wanted to canvas all of our creditors to make sure that what they were seeing was acceptable to them. And notwithstanding the fact that we only got three rejecting votes, eight creditors that did vote to accept. That will play a role later on when we talk about releases, but there are only accepting parties, all of which through the mechanics of the release provision, you know, are deemed to consent to those releases.

The plan is phenomenal in a couple of reasons, Your Honor. In addition for the administrative claims to be paid in full, those same claimants have the election to choose a convertible loan note feature, which means once they become an allowed claim, they're going to be sent the notice that we've attached to our proposed confirmation order, and they will get to choose cash in full or to be part of the capital structure which is a paid interest of 8 percent once they are converted at either the end of the plan term or a bonafide equity financing or a merger. So they can get the entire upside of the company.

We thought this was particularly attractive to those creditors that are competitors to ours and we are already in

discussions on a potential combination such as KSS as well as Capital.

In addition, Your Honor, the GUC recoveries have increased tenfold in our mind from where they were initially that showed there was no disposable income that would flow down to the debtors to now having upwards of 155 grand that will flow to the creditor body. We have a relatively small creditor, general unsecured creditor body all things considered. So this is a, you know, market recovery, and things that we're talking about and may do with respect to the capital claim may also increase those recoveries for other parties. And, of course, Your Honor --

THE COURT: I should know the answer to this and I apologize. But in terms of the claims reconciliation process, how far along is it? Do we have a sense from the perspective of the unsecured creditors what the universal claims looks like or is that --

MR. BARSALONA: Yes. I will say it's about $6 million of GUCs, but 4 million of that is capital. So, and of course, of that 2 million, there's a large piece that were critical vendors and other parties in interest that we are working with and vendors that we will continue to work with over the course of the plan.

THE COURT: Okay. That's helpful. Thank you.

MR. BARSALONA: Of course. ANd also a major feature,

Your Honor, of course, was the convertible loan note with respect to the DIP financing as well as the exit financing which is 500K new money that's being put in subject to the terms of the term sheet. And we are feverishly working on those documents, Your Honor, we're probably going to file an additional plan supplement. In fact, we plan on it with those final documents post confirmation to make sure the record is clear and everything is there. But to, that is a gift.

I will say that is an incredible gift that goes to what Mr. Jaffe had said about how important our plan sponsor and a partnership it has been with Monomyth since day one, that they are taking this money that they have put in, that they had all the bells and whistles of the DIP. We had a contested interim DIP hearing in this Court months ago on the terms, and we wanted to make sure it's an insider DIP and there were very tight time strings or, you know, features of it that Ms. Nimeroff had issues with, the UST had issues with and we wanted to make sure that at the end of the day that it was a fair result for the company.

And, you know, from my personal opinion, the DIP lender has gone above and beyond to do that by basically forgiving it. Obviously, there are bells and whistles connected to the notes that it is not a complete waiver of that claim, but still it is not 970 approximately on our balance sheet unsecured debtor post-effective date, but is now in this

note structure.

So that is the plan, Your Honor. We put forth our brief in support of why it can be confirmed under 1191(b), it's a five year plan, we will have post-confirmation reporting consistent with the U.S. Trustee guidelines on that on a quarterly basis.

And so we are still in this pseudo realm of some type of bankruptcy post-effective date. And the majority of things we could do outside of it. But this will allow the company to prosper and take the trajectory positive with this very important and valuable brand for the next hopefully many, many years to come.

THE COURT: Okay. Thank you.

MR. BARSALONA: For that, I will, if any other parties are, want to speak to confirmation, I'll allow them to do so now.

THE COURT: Okay. Very well

Ms. Nimeroff?

MS. NIMEROFF: Good morning, Your Honor. Jami Nimeroff, subchapter V trustee.

Your Honor, I in my role as subchapter V trustee, part of my duties are to speak to confirmation and my views of confirmation.

Your Honor, I think where this plan has ended up as compared to where things started as, you know, in terms of, I

would echo the comments of debtor's counsel. I think it's a dramatic improvement from where things started.

While it remains to be seen what the overall recovery is for unsecured creditors in terms of dollars, it is a large improvement from where things started in terms of backstop support for it. That is there which was not before in addition to the backstop for administrative creditors.

Your Honor, if we just look at the confirmation requirements under 1191(b), I'm not going to go through everything Mr. Barsalona and his colleagues put in their brief, but Your Honor for the non-consenting classes, which is the GUC class, they are entitled to the fair and equitable treatment which requires the devotion of three to five years of disposable income.

Your Honor, disposable income does not in and of itself allow creditors to get the benefit of capital investment that is done on the way out the door. So the 500,000 in new money that is on these projections it shows the viability, you know, feasibility of the projections, but that's not something that unsecured creditors just get to glom onto under this test, right, wrong or otherwise. That's just the reality.

So I think the fact of the opportunity for guaranteed recovery unsecureds is a great result here.

THE COURT: So I'm not, jut to make sure I'm following, I'm not at all troubled by the notion that there is

an exit facility that creates liquidity for the reorganized debtor that doesn't translate into a recovery because the basis for the recovery is the projected disposable income. And to the extent there's a capital infusion that may facilitate the generation of disposable income but isn't itself disposable income. Is that, am I basically following your train of thinking?

MS. NIMEROFF: Yes, Your Honor. The way I understand, the way the disposable income test is supposed to work is it doesn't generally contemplate the idea of a cash infusion on the way out the door.

THE COURT: Right.

MS. NIMEROFF: And, so what creditors are really sort of what they're entitled to is what would this company be able to generate on its own existing equity over a three to five year period. So this is just sort of enhancement of that. I'm not saying that's not part of the record and the Court shouldn't consider it, but I mean in terms of what creditors are entitled to, that's not something in and of itself that I believe the test contemplates.

Your Honor, in terms of sort of the other aspects of the rule of construction for fair and equitable, you have to determine that the plan largely is feasible and that the plan payments will be made. If not, there should be some default provisions in here.

Your Honor, I do believe the record and the supplemental declaration that was done will allow you to make that finding. However, there is a default provision in the plan, 6.8, has sort of a backstop, if you will, to that finding. But that is in there. And as Mr. Barsalona noted, the confirmation order does contemplate the reporting that we generally have in this jurisdiction in B confirmation cases.

So, Your Honor, with the supplemental declaration and the plan supplement that contains the signed note term sheet which is sort of obligates this sponsor to put in the money and to do the conversion, I think that again this is a, this is a really tremendous result from here to there so to speak, from where we started, and I support confirmation.

THE COURT: Okay. So just, I think the record is clear enough, but just so I satisfy myself, your last pleading was a reservation of rights. I take it, where you are now is that reservation has been satisfied and you now support confirmation.

MS. NIMEROFF: Yes. And, Your Honor, frankly at the time I knew a third amended plan was coming but it hadn't even been filed yet, and just given the timing of the situation, yeah.

THE COURT: I totally understand. The deadline, I get it. I just wanted a clear record.

MS. NIMEROFF: Yeah, absolutely.

THE COURT: So I appreciate that.

MS. NIMEROFF: And, Your Honor, just to make it extra clear, I spent a fair amount of time with debtor's counsel and Mr. Jawad about, talking about the projections, and specifically asked for the supplemental declaration which I think did a great job in furthering the record and in answering a lot of the questions that I had.

THE COURT: Got it. Thank you very much, Ms. Nimeroff.

MS. NIMEROFF: Thank you, Your Honor.

THE COURT: So Mr. Elroy I see you turned on your camera. Would you like to be heard with respect to plan confirmation?

MR. ELROY: Yes, Your Honor. This is John Elroy of Greenberg Traurig on behalf of Monomyth Sponsor Group, the DIP lender.

Your Honor, just a clarification on the terms of the exit financing. I believe Mr. Barsalona misspoke when he talked about I believe he referred to note there on the balance sheet an immediate conversion. There is, the term sheet does contemplate a convertible note feature which is secured by senior first lien secured obligations of the company until there's a conversion event. So I just wanted to be clear on the record that that's what is contemplated.

THE COURT: OKay. Thank you, Mr. Elroy.

Mr. Barsalona, is that a fair statement?

MR. BARSALONA: Yes, Your Honor. And I think Mr. Dunn is on the line too. To the extent I believe the entire intent in all of our discussions with the debtor have been that there will be a conversion at the end of those three events.

THE COURT: Okay. All right. I just wanted to make sure, it sounds -- okay, fair enough.

Mr. Dunn, would you like the opportunity to be heard or -- okay, I'll take that as a no.

MR. ELROY: So the record is clear, Mr. Dunn is [indiscernible].

THE COURT: Okay.

MR. ELROY: And looks like he has declined to speak which is understandable.

THE COURT: Fair enough. So let me ask this first. Is there any other party in interest that would like to be heard with respect to confirmation on any issue other than the release issue?

Okay. So I don't have further questions with respect to this. I think that the parties here have done a tremendous job. I guess I do have a question about the relationship between the confirmation order and the third party release issue.

MR. BARSALONA: Absolutely.

THE COURT: If you could help with that. So tell me

how dependent or separate are these issues?

MR. BARSALONA: Your Honor, I believe we have a very vague paragraph in the order that says these releases are approved. Whatever the ruling is today we could easily add in provisions that modify what the plan does with respect to them. That could be done very, very quickly uploaded today, notwithstanding whatever Your Honor's ruling on that issue may be. So there's nothing that needs to be removed that is in there, it just speaks generally about the releases being approved in XYZ provisions --

THE COURT: Okay.

MR. BARSALONA: -- for the general findings related to wire releases.

THE COURT: All right. So why don't I hear the argument with respect to releases and then come back to the question depending on where my brain is after I've heard everyone out.

MR. BARSALONA: Absolutely. Would you like to hear from the debtors first, Your Honor, or the objector.

THE COURT: Do the parties have a preference?

UNIDENTIFIED SPEAKER: Just assume hear from you and then we can respond.

THE COURT: All right. Fine.

MR. BARSALONA: Perfect. So, Your Honor, let's start with Purdue. And let's talk about what it specifically carved

out.

THE COURT: Okay. Actually, before we do that, can we start with, and I should understand this better than I do, so my apologies, can we talk a bit about who are the beneficiaries of the releases and the scope of the releases?

MR. BARSALONA: Absolutely. Absolutely. So the release parties include the majority of the entities related to the debtor and the DIP lender, and your typical representatives including officers, directors, partners, etc. I'm glad you asked that question, Your Honor, because a comment from one of the now accepting parties, Monomyth, was to carve out former officers and directors and founders. And that addition was added to the representatives definition in there to make sure that they don't flow.

Why that's important, Your Honor, is because of the first category, and we can go into the different categories of who is actually giving the release. And I see that as three main parties -- those that voted to accept, those that are presumed to accept, and those that rejected and opted out.

There is no release for those that threw away their ballot that had the ability to vote. So you are really hitting on the unimpaired creditors in the presumed accepting classes in the PTO claims and equity. The eight parties that accepted in the GUC class, the one DIP lender claim that voted to accept, and then all of the parties that voted to object and

opted out. And I can represent --

THE COURT: Well, those who voted to reject and opted out of the release, you're saying they are given the release despite having opted out?

MR. BARSALONA: No, no. They all chose to opt out of the release.

THE COURT: Okay. So the two parties --

MR. BARSALONA: They are out, yes.

THE COURT: The two parties who are given the release are a) those who voted in favor of the plan.

MR. BARSALONA: That's correct.

THE COURT: And b) those who essentially didn't get to vote on the plan because they were deemed to --

MR. BARSALONA: They were unimpaired.

THE COURT: They were unimpaired.

MR. BARSALONA: They were presumed to accept.

THE COURT: Okay.

MR. BARSALONA: And they are getting all of the benefits from the debtor in satisfaction of their claims.

THE COURT: Okay.

MR. BARSALONA: And they are coming out full at the other end.

THE COURT: Again, this is another thing that maybe I should know if only I were better, is this a case in which there were any claims actually asserted either before or during

the bankruptcy case?

MR. BARSALONA: There were claims asserted during the bankruptcy case by an entity that's no longer here, Camber.

THE COURT: And whose claim has been acquired.

MR. BARSALONA: Purchased.

THE COURT: Right? So it's not that they're not here, they're really not here.

MR. BARSALONA: Exactly. Exactly. And you also have, there were claims of course of prepetition issues of how the company ended up in bankruptcy, hence, the reason why we chose to carve out.

THE COURT: Pause.

MR. BARSALONA: Yeah.

THE COURT: I understand there are claims against the debtor that brought the debtor into bankruptcy.

MR. BARSALONA: Yep.

THE COURT: Were there prepetition claims asserted against the beneficiaries and third party release?

MR. BARSALONA: No, there were not.

THE COURT: Okay. All right. I apologize.

MR. BARSALONA: Not at all, Your Honor. And when I say claims I'm speaking the general sense. There has not been any causes of action that are brought. The company is still looking into those parties that we are looking into investigating. But the entities that are the beneficiaries of

the release truly is Monomyth as DIP lender and its capacity as DIP lender, and there is no corresponding release party should I say, so those that give a release, get a release, that's not happening at all.

THE COURT: I understand. Okay.

MR. BARSALONA: So those are the beneficiaries.

THE COURT: Okay.

MR. BARSALONA: And as I said, the three categories of parties that the Court needs to consider are the voted to accept parties, the presumed to accept and reject and opt out. And the mechanism itself, Your Honor. And again let's start with Purdue.

I don't understand why we are having this debate in opt out consensual cases when there's an actual carve out in the opinion that says specially, we are not speaking at all about consensual releases.

THE COURT: Correct.

MR. BARSALONA: And what is deemed to be consent. Therefore --

THE COURT: I'll tell you why we're having the conversation. Because at least, at least in my view, so look, before Purdue Pharma, there were as you know judges of this Court who thought that a consensual release meant one in which the person affirmatively expressed their consent.

I reached myself the opposite conclusion. I said

that opt outs were okay, but in explaining why I thought they were okay, it's because at least in part because of the ability -- the question, one way of thinking about it is the very thoughtful opinions, you know, in Wamu and in Emerge (phonetic) by my colleagues say consent, the way to think about consent is a contract. And we don't say someone is bound by a contract because they got an offer to which they didn't respond. The way you say they've consented is an offer of an acceptance. That's a perfectly fair way of thinking about it.

Now, I came to a different conclusion which is you got notice, you had the opportunity to speak up about it, you chose not to and that's, I can infer your consent from your failure to respond. But the question is what is your, what is the basis to impose on someone an obligation to respond.

And I found that there was a basis to impose an obligation to respond in a world in which there were non-consensual releases. It's just like a plan term like any other plan term. You can like it or not like it, but it's a plausibly legal term, at least it was in this jurisdiction because of Continental. And if you're unhappy with a plausibly legal plan term, you've got to show up and say so.

And so to me the reason we're having this conversation after Purdue is because there's no longer a plausibly lawful basis to do this to someone without their consent. And that to me gives rise to at least the question,

what is our basis to impose on them their obligation to speak up if they don't want it.

So that's, that doesn't answer the question, but I think it answers at least your question as why we are having this discussion. I do think Purdue is not irrelevant to the question of opt in versus opt out.

MR. BARSALONA: I would agree with that, Your Honor. I would turn to the 1141 super contract that you also spoke about in Arsenal. All of that logic and reasoning remains undisturbed in that when there's prominent and conspicuous notice given to each and every one of these parties, that they can object to the releases.

THE COURT: So, Mr. Barsalona, what is the limit to that principal? Imagine, imagine the plan said every creditor is required to you know deliver a $50 check to the debtor's CEO. And that's what the plan said, it was conspicuous and it was prominent. And it went out and people didn't respond. Is that a legally enforceable obligation?

MR. BARSALONA: If it comes under the bankruptcy code, right? And again there is no decision yet on whether or not consensual releases are within 1126. There's still no opinion about that at the higher court level. And --

THE COURT: Right.

MR. BARSALONA: Again, if that has already been deemed to be consent under Indianapolis Downs that people have

done time and time again, right.

THE COURT: I understand.

MR. BARSALONA: Then how, how does that change the nomenclature? How does that change anything that we have done previously where we have asked for creditor consent? And again, let's look at this case.

THE COURT: In fairness, Indianapolis Downs is one perspective, right, and --

MR. BARSALONA: Yes.

THE COURT: And there other opinions of this Court that have come out the way.

MR. BARSALONA: Yes. So let's specifically, and honestly, Your Honor, the opt out parties for purposes of what we're talking about, it's like we said, the mechanism worked. Because every single party that rejected --

THE COURT: I understand.

MR. BARSALONA: -- opted out. We didn't choose anyone, you know, they had to opt out, no matter what they'd be deemed to do it. In this particular case, if you chose to vote to reject so you're actively looking t your ballot, then you also have to op out to not do it, and each of those three did that.

THE COURT: And I take it that creditors who voted in favor of, there was no choice here to say, I support the treatment of my claim, but I want to hold on to my right to sue

third parties. That option wasn't given to folks. Right?

MR. BARSALONA: They could object to the plan. They could object to the plan.

THE COURT: They could object to the plan. But could they vote in favor and say, if you think that what voting is, there's at least a view to this end, that what the vote is fundamentally about is the treatment of that class of claims. Could you say I'm fine with the 100 and some thousand dollars that are going here to general unsecureds, I'm good with that, so I have no problem with the treatment of my claim. But as to my, the claim that I have against the third party, there I'd like to hold that, please. Do they have a way to accomplish that?

MR. BARSALONA: Absolutely. Look at what Monomyth did. Look what Monomyth did because they --

THE COURT: Oh, you could vote in favor --

MR. BARSALONA: -- did not, so they didn't vote. To Correct Mr. Jaffe's record, they did not vote to reject and flip their vote, they didn't vote at all.

THE COURT: Okay.

MR. BARSALONA: They didn't vote at all. And then when it was time to come to the deal they said we need to carve these individuals out and then we can vote in favor of the plan.

THE COURT: I see.

MR. BARSALONA: So the individuals, the eight of the GUC class that voted to accept had the same rights around them, we would hit them over the head with every single iteration of the plan since May. We served the plan itself out on literally the entire creditor matrix which is not required, but we did that to make sure that we had prominent and conspicuous notices as your Court, as Your Honor has required previously. And we continued to do it. And those that are presumed to accept that are unimpaired, so they're living with the PTO that's going to be paid in full as well as the equity that's getting, that's retaining all of their interests. Right? They're the ones that are unimpaired that are deemed to give these releases.

We made sure we were very vocal with those that have reached out to us, that spoke about it, that had asked questions about the releases. That shows the process works, that the mechanism works, that people that are involved in this case and receiving these types of notifications are reaching out to the proper people to voice their concerns if necessary, and we listened.

THE COURT: Okay.

MR. BARSALONA: And we didn't jam anything down people's throat. So in that sense, Your Honor, the classes we really care about and want to leave undisturbed as we believe Purdue does, are those that voted to accept the plan to get the release in accordance with all this Court's case law.

Washington Mutual itself said mechanism voting of the plan works, Spansion, Quorum, Exide, those are all vote to accept give the release.

And with respect to the presume to accept, again, this falls within Arsenal's logic and reasoning as well as Indianapolis Downs and other opinions as well that we think leave undisturbed.

And for that, Your Honor, we believe that the release provisions are appropriate and valid here.

THE COURT: Okay. Thank you, Mr. Barsalona.

Mr. Cudia?

MR. CUDIA: Thank you, Your Honor, Joseph Cudia for the United States Trustee. I'm here with my colleague, Ms. Sierra Fox.

And as an initial matter, I want to thank debtor's counsel for working with us to narrow down the issues. Also too, the portion of our objection regarding the plan as a settlement, the former 6.9, was eliminated from the third amended plan which was filed shortly after we filed our objection. And also the definition of representatives was narrowed. We thank them for that.

I also want to recognize the additional commitment from the plan sponsor that does add some money to the pool for general unsecured creditors.

We object to the confirmation of the plan because

it's our position that it provides for non-consensual third party releases. In other words, non-debtors releasing non-debtors, and the injunction to enforce those releases.

Since the Supreme Court ruling in Purdue Pharma prohibits non-consensual releases as lacking support in the Bankruptcy Code, we believe it makes sense to reexamine what qualifies to demonstrate consent to such releases for reasons we will discuss.

Basically our objection breaks down to four parts. That the plan as proposed forces holder of claims that are deemed to accept such as those classified unimpaired where they have to grant the third party release without their assent of any form, not even an opt out.

THE COURT: Let's slow down, slow down.

MR. CUDIA: Yes.

THE COURT: So this category is those who vote in favor?

MR. CUDIA: No, those that are unimpaired.

THE COURT: Unimpaired. So if an unimpaired creditor had filed an objection to the plan and said, I object to the plan because the third party, because I oppose the third party release, wouldn't that have been a mechanism to protect their ability? There, the debtor would have basically had no choice, right, unless they wanted to argue that this was a permissible non-consensual release which is a [indiscernible] in light of

Purdue Pharma, they would have had to cut them out. Right?

MR. CUDIA: Um-hum.

THE COURT: So the difference between what happened here and what you would like is they weren't given a piece of paper that said expressly check this box.

MR. CUDIA: They were not.

THE COURT: They could have filed a plan objection.

MR. CUDIA: They were not given the opportunity to separately assent to this, and I'll get to that a little bit, but yes.

THE COURT: Right. I understand. Okay. And do we have a ballpark universe of how many people we're talking about here?

MR. CUDIA: It's any administrative claimant. There are some priority tax claims if I recall correctly.

THE COURT: Okay. So priority claimants and the administrative. The classes that are unimpaired here are only basically priority claims, right, admin claims, the priority tax claims, etc.

MR. CUDIA: Well, in this case, equity also.

THE COURT: And equity is unimpaired.

MR. CUDIA: Yes.

THE COURT: Okay. Fair enough.

MR. CUDIA: That the plan as proposed forces holder of claims that vote to accept the plan to grant the third party

release without their separate assent, again, of any form to the third party releases.

And that the plan as proposed requires those to vote to reject the plan to separately indicate that they do not consent to grant the third party releases.

And then, of course, that the plan's form of indicating consent of an opt out mechanism is not a true indication of consent to the releases.

Of course, as we're all aware of the U.S. Supreme Court in Purdue Pharma held that non-consensual third party releases are not authorized under the bankruptcy Code. As such, it follows that the holder of a claim must manifest assent at least in some fashion to the granting of a third party release.

A claim or an interest holder such as an unimpaired claimant who is not voting is not given the opportunity to manifest that assent in any way cannot be said to consent to the third party release. There's no exception in Purdue for those that will eventually be paid in full.

THE COURT: Well, there is that funny language in Purdue that I'm not sure I understand that talks about the category of paid in full cases, right.

MR. CUDIA: Yes.

THE COURT: So you have to give that some meaning, right?

MR. CUDIA: Certainly.

THE COURT: Do you have a theory for what meaning we ought to give it?

(Laughter)

MR. CUDIA: No. I read the recent article in ABI and I have to confess I still don't understand it.

THE COURT: All right, well, we're on the same page there.

MR. CUDIA: In their confirmation brief at paragraph 72, the debtor cites to Indianapolis Downs for the premise that unimpaired claimants "consent" to the releases, talking about consideration for those releases. And the Court in Spansion says basically the same thing.

Post Purdue as it pertains to a third party release, the consideration is immaterial, it's either consensual or it's not, nor does reasonableness, fairness [indiscernible] nor do they have any merit as far as they're the Continental standards. None of that matters anymore.

That's exactly why a reexamination of these issues is warranted post Purdue. Many earlier decisions are partially Based on a prior availability of non-consensual third party releases for Continental. And further, 1124 provides that a creditor is unimpaired if a plan leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of that claim or interest. Having

to grant a third party release is an impairment as it does not leave the creditor in the same position, as the same rights as they had before the case.

THE COURT: So can I ask a really annoying question? So, look, as I think my questions to Mr. Barsalona may have revealed, I think this is a hard question. I don't know for certain what I think about whether it's appropriate to impose on a creditor the obligation to opt out after Purdue Pharma as to whether if it wants to keep its claim, the way I frame the issue, this particular issue is whether the code authorizes us to impose on a creditor who wants to keep the claim, the obligation to speak up if it just wants to keep its claim against non-debtor parties. I think that's a difficult question after Purdue Pharma.

All things being equal, if I got to choose how I do my job, I'd resolve that when someone comes to me with a solicitation motion before the, you know, cake is in the oven, and rather than deal with it after the fact. And I'm not, ruling your way here wouldn't unravel anything, I don't want to overstate it, but if I had, if it were up to me, I'd come back to this in that context. I'm not blowing off your argument in the least. To the contrary, I'm concerned about it. But I feel like there's some element.

Purdue Pharma put everyone on notice, we all, you know, the law is when it's made by judges, is done

retroactively, it's done by we've reached decisions in particular cases and they have effect to the parties in the case. So that's just the nature of the judicial process. So I'm not saying we should do anything prospectively only.

That said, we would minimize the, if, look I wrote a decision in Arsenal that there are, if it turns out that Purdue Pharma requires us to revisit what we've, how we've been thinking about it, it feels to me for the good of the system doing that in connection with a solicitation motion would be less disruptive than doing it here after the plan is already otherwise done. Now, you can say, well the debtors could have filed a solicitation motion, I guess that would be a fair response.

But I'm just asking from your perspective, I mean this is a sub V case, we're talking about relatively smaller amounts. How grave an injustice would it be if the answer were under the circumstances here, I'm going to conclude that this was consensual, but it's entirely without prejudice to the ability to rethink this the next time it comes down the pike in a way in which whatever ruling I would make would not be as you know, in which it would effectively prospective rather than retroactive?

MR. CUDIA: Well, I can answer that. I guess there's a couple of questions there.

As far as the first, I can understand your position

as better dealt with at solicitation. In this case, we had Purdue Pharma be decided --

THE COURT: In between. I understand. And look, I also understand that there are times when you get here at solicitation and judges yell at you and say, that's a confirmation issue. So you lose both ways. So I'm not, I'm trying to be fair to you.

MR. CUDIA: I was going to go to that too.

THE COURT: Okay.

MR. CUDIA: As far as what my client's position would be as far as that kind of ruling, I can't really say, we didn't really discuss that specifically.

THE COURT: That's fair enough. That's a perfectly fair answer.

MR. CUDIA: But, yeah. So at least as far as parties that vote to accept the plan, again, as I indicated, they must be given the opportunity, separately manifest dissent to those releases. The claim holder might not understand the implications.

And it's out position that it's not true consent to extort from a third party release from a claim holder as a requirement of voting in favor of its treatment under the plan. Not here, but in a typical chapter 11 plan, in accepting non [indiscernible] class is required for a plan to be confirmed. And a vote to reject may sink a plan and result in worse

treatment of its claim than whatever it would have gotten which is typically less than they originally bargained for when they made the deal.

THE COURT: And so what's your response to Mr. Barsalona's pretty clever response to that point, which is well, look, look at what the DIP lender did here, there was a mechanism that allowed you essentially to vote yes, but you know not have a third party release you didn't like and that was available to everyone, and isn't that good enough?

MR. CUDIA: I don't think after Purdue it's good enough. I think they need to, they need to actually separately assent to the release.

THE COURT: Am I right that none of my colleagues have addressed this question after Purdue?

MR. CUDIA: I don't believe they have here. There are some --

THE COURT: And what did I do to make you all mad to bring it to me first?

(Laughter)

MR. CUDIA: There are a few other decisions that have happened. I know of one in New Jersey where it found opt out was good.

THE COURT: Yeah.

MR. CUDIA: I know the Judge in Ebix case in Northern District of Texas glowingly cited Arsenal right up to the point

where he found that [indiscernible] are required.

THE COURT: Right.

MR. CUDIA: But, again, it's a very sparse record even outside this district.

THE COURT: Okay.

MR. CUDIA: And, again, on that same subject, the holder of a claim deprived of any right they might have to recover on their claim is not necessarily receiving more than they would receive under chapter 7 liquidation depending on what rights they might have had against a third party.

Parties that vote to reject should not have the added burden of checking an additional box to avoid granting releases contained in a plan that they already rejected. Strain credulity to conclude that the holder of a claim that voted to reject the plan would assent to granting the releases contained within.

And the court in Classics Holdings (phonetic) as they noted, that it's little more than a court endorsed trap for the careless or inattentive creditor.

In voting to reject the plan, the claim or interest holder has already indicated they do not support the treatment they are receiving. And if parties who vote to accept or deem to consent to the releases contained within, the same logic would apply to those that vote to reject including if they had rejected the whole plan.

All right. Now, on the subject of opt in and opt outs. Again, it's been the longstanding position of the United States Trustee that a holder of a claim must opt in to affirmatively provide the required assent to grant third party releases. The ruling at Purdue Pharma and its holding that non-consensual third party releases are not permitted demands a reexamination of how such assent can be manifested.

Again, I won't go through, you're certainly, the Court is certainly aware of the decisions of judges in this Court that have found that an opt out is not appropriate.

Of course, as Purdue instructs, a bankruptcy court is not endowed with the power to extinguish without consent claims held by non-debtors against other non-debtors.

And those courts that have found that an opt in is required, often look to basic contract principals for guidance. Regardless of any conspicuous warnings on the solicitation materials, they find that no duty arises for a claim holder to speak. And of course, again, as I'm sure that the Court is aware, basic contract principals that are silenced in an action generally cannot be deemed as assent except in limited circumstances which are not present here.

Here, we have a, a creditor can expect to have their rights impacted as far as the debtor. Post Purdue, a plan can no longer contain a consensual, a non-consensual third party release so that a creditor cannot be expected to anticipate

that his rights may be impacted with respect to a third party. And as far as understanding the plan, a possible exception of the largest unsecured creditor just doesn't make sense for a lay creditor to hire counsel to interpret the plan, the ballot and their implications.

Again, in the Third Circuit we have Continental which did hold that non-consensual releases were permitted at least under some limited and demanding circumstances.

THE COURT: That's now water over the dam. But whether that's a holding or not is actually a pretty interesting question.

MR. CUDIA: Yes. All right. The earlier cases were decided with a backdrop of non-consensual third party releases being permissible under certain circumstances. After post Purdue which now requires a separate consent to the third party release, third party release should be looked at as a separate contract between the creditor and third parties. Well, actually between third parties -- non-debtor, the creditor and third parties, not the debtor. Which require an affirmative consent like any other contract.

Since it requires a separate consent from the rest of the plan, it should not be looked at as a plan provision to which a creditor is bound upon confirmation pursuant to 1141.

In other places in the Code, the Court has given the authority to value, you know, to value claims, cure amounts,

even without consent. Those adjudications remain between the debtor and the creditor.

Your Honor, it's the position of the United States Trustee that any holder of a claim from which the debtor wants a third party release per the holding of Purdue Pharma, that holder must assent to that release. All classes of creditors that the debtor proposes grant the party release must be given the opportunity to show that they consent. And it is the position of the United States Trustee that only an opt in arrangement assures that the holder truly assents.

We ask the Court to deny confirmation of the plan so long as it contains the non-consensual third party release and the injunction that supports it.

THE COURT: Okay. Thank you.

Mr. Barsalona? So I want to be practical for a moment. Look, I think my wish that I could not resolve this in this case, I don't see a way to get from here to there. This is a hard question. You in the meantime have a smallish business and a debtor that needs to get out of bankruptcy. Is there a way to submit a confirmation order that in which I confirm a plan and reserve on the scope of the release and give this further thought?

I don't mean to be dilatory, but I want to be pragmatic.

MR. BARSALONA: Right.

THE COURT: You heard me thinking out loud trying to say can I save this for another case persuading myself that that would be nice but lawless.

(Laughter)

THE COURT: So I don't think that's one of my options. So in a world in which I have to decide it, and I don't think I'm going to decide it like from the bench, and so is there a way to get through the day that saves the company and allows me to figure this out?

MR. BARSALONA: Absolutely, Your Honor. And I'm rushing to try to find the paragraph that speaks about releases. And what my idea would be is that paragraph itself would be -- thank you, Jill -- it's O, and there could be a corresponding numbered paragraph, but either each release paragraph we'll put reserved and we'll put a footnote saying reserved for further determination by the Court, so that we can enter an order today and then depending on --

THE COURT: Let me turn to the U.S. Trustee. Is proceeding in that fashion acceptable to your office? Because we're no longer in a world of necessity, right, it's just about what counts as consent, so they don't, the world in which they had to, they rose or fell together I think is behind us.

MS. FOX: Your Honor, Rosa Sierra Fox on behalf of the U.S. Trustee. And I don't mean to trample on my colleague, we rarely get to collaborate, so this is one of those

instances.

I think Your Honor is correct on the assumption that the debtor agrees that they don't, the parties on the table with respect to this plan don't need these releases or demand these releases to fund, get whatever funding is in place.

THE COURT: Exactly. That's the necessity issue that's behind us.

MS. FOX: Yeah. And that would be --

THE COURT: So can I suggest that the parties meet and confer and settle an order under certification that basically carves this out? We'll enter that order as soon as it comes through. I'll take under advisement the good and complicated issue presented. I'll get it decided as quickly as I can, but not so quickly that I make a mess of things.

MR. BARSALONA: Absolutely.

THE COURT: Agreeable to the U.S. Trustee?

MR. CUDIA: Yes, Your Honor.

THE COURT: Okay. That's how we'll proceed.

MR. BARSALONA: With that, Your Honor, that's all we have today.

THE COURT: Okay. Let me ask this. Is there any other party in interest that would like to be heard with respect to any other matter? Any other way in which the Court can be helpful to the parties? Okay, if not -- let me go back because we never got a chance to say this.

The good and hard work that was done by everyone on the core issues on the case about reorganizing this company and coming up with a mechanism to salvage the business and treat creditors fairly and appropriately was terrific work by everyone. And I want to thank all of the professionals, the underlying business folks. I appreciate that there was compromise all around. I want to really express my thanks to the subchapter V trustee who clearly has played the role that the statute contemplates in making it possible to save these businesses and respect principles of bankruptcy laws. So really do appreciate everyone's good and hard word and don't want that to be lost.

There is a complicated other issue, but that in the scheme of things, you know, shouldn't cause us to lose sight of the really good work that everyone has done here.

So let me thank you for all of that. I'm delighted to enter that order, and we'll do so as soon as it comes through under certification. I'll then figure out the answer to this other question to the best of my abilities, and we'll take it from there.

So with that and really my thanks to everyone, we're adjourned.

ALL: Thank you, Your Honor.

(Proceedings adjourned 11:00 a.m.)

* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ Theresa Pullan September 5, 2024

Theresa Pullan, CET-780

Certified Court Transcriptionist

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